



STATE OF INDIANA

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February 21, 2011

Mr. Gary VanHook
P.O. Box 155
Atlanta, IN 46031

Re: Formal Complaint 11-FC-32; Alleged Violation of the Access to Public Records Act by the Atlanta Town Council

Dear Mr. VanHook:

This advisory opinion is in response to your formal complaint alleging the Atlanta Town Council ("Council") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*, by denying you access to public records. The Council's response is enclosed for your reference.

BACKGROUND

On January 13, 2011 you allege that you received a letter from the Atlanta Town Council in response to a records request you made on January 5, 2011. In that response, the Atlanta Town Council advised that "there are no documents that we can provide at this time [sic], but we will attempt to answer your questions." You inquire in your complaint whether such a response to your request is an adequate denial under the APRA.

My office forwarded a copy of your complaint to the Council for a response. Mr. Culp responded on behalf of the Council. In it, he states that some of your requests are for the Council to answer questions, not for any records. As such, Mr. Culp avers that such requests are not permissible under the APRA and the Council was "under no obligation" to answer your questions. Mr. Culp states that your records requests relating to an internal investigation by Atlanta Police Department, particularly enumerations 2 and 3, are exempt under the investigatory records and intra-agency and deliberative material exceptions under I.C. § 5-14-3-4(b)(1) and I.C. § 5-14-3-4(b)(6). Mr. Culp argues that such records are exempted from disclosure not only because they are investigatory records from the Atlanta Police Department but also are intra-agency records between the Council and the Indiana State Police ("ISP").

ANALYSIS

The public policy of the APRA states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” I.C. § 5-14-3-1. The Council does not dispute that it is a public agency for the purposes of the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Council’s public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a). The burden of proof for nondisclosure of a public record is on the public agency that would deny access to the record. I.C. § 5-14-3-1.

In its response, the Council relies on I.C. § 5-14-3-4(b)(1), the investigatory records exception, as it relates to the requested records. That exception provides that a law enforcement agency has the discretion to disclose or not disclose its investigatory records. An investigatory record is “information compiled in the course of the investigation of a crime.” I.C. § 5-14-3-2(h). The investigatory records exception does not apply only to records of ongoing or current investigations. Moreover, it does not apply only to an investigation where a crime was charged or an investigation where it was adjudicated that a crime was indeed committed. Instead, the exception applies to all records compiled during the course of the investigation of a crime, even where a crime was not ultimately charged, and even after an investigation has been completed. The investigatory records exception affords law enforcement agencies broad discretion in withholding such records. *See Opinion of the Public Access Counselor 09-FC-157*. It is my opinion that if the records you request relate to an investigation of the Atlanta Police Department, then they are excepted from disclosure under I.C. § 5-14-3-4(b)(1).

The Council also cites to the so-called deliberative materials exception to the APRA as its legal basis for refusing to disclose the any records relating to the investigation by the Atlanta Police Department. The deliberative materials exception is found at I.C. § 5-14-3-4(b)(6):

(b) Except as otherwise provided by subsection (a), the following public records shall be excepted from section 3 of this chapter at the discretion of a public agency:

...

(6) Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.

The deliberative materials exception requires that the records be expressions of opinion or speculative in nature and communicated for the purpose of decision making. Mr. Culp states that the “documents and records communicated between the Council and the ISP are for the purpose of decision making...specifically involving whether certain conduct constituted criminal acts an if so, whether the Sate Police should assist with the investigation.” It is my opinion that if the records constitute a speculative communication between the Council and the ISP for the purpose of decision making, then such records

qualify as intra-agency and interagency deliberative material and the Council did not violate the APRA by withholding it.

It is important to distinguish what constitutes a question and an actual records request. It appears that in your request, you both asked questions and made request for records. While no obligation exists to answer questions, an agency is required to cite to statutory authority should it decide to withhold records from disclosure. Here, the Council responded to your request in writing within the seven (7) days as required by the APRA. The Council's response, however, is lacking in specific statutory citations that would authorize non-disclosure of the actual *records* you requested in the context of the questions you posed. Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and must include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. I.C. § 5-14-3-9(c). Consequently, the Council's failure to deny your request in accordance with subsection 9(c) violated the APRA. Previous public access counselors have opined that general citations are not sufficient, and as such, agencies should cite to specific provisions that bar a records release. For future requests, I would encourage the Council to cite a specific statutory basis for refusing to withhold any records.

CONCLUSION

For the foregoing reasons, it is my opinion that the Council has violated section 9 of the APRA by failing to cite to specific statutory authority in its denial of access. The Council has not otherwise violated the APRA.

Best regards,



Andrew J. Kossack
Public Access Counselor

Cc: Aaron P. Culp